INDEX

LIST OF CASES REFERRED TO

By Petitioner

By Supreme Court of Nebraska in Its Opinion

IN THE

Supreme Court of the United States

October Term, 1922.

No. ————.

JAMES C. DAVIS, AGENT OF THE PRESIDENT, UNDER SECTION 206 OF THE TRANSPORTATION ACT, 1920,

Petitioner,

vs.

JOHN O'HARA,

Respondent.

BRIEF OF PETITIONER ON PETITION FOR WRIT OF CERTIORARI

STATEMENT

The questions involved are:

Whether the court should have held that the District Court of Douglas County, Nebraska, had jurisdiction;

Whether the court should have held that the present defendant could be substituted as defendant, after the expiration of one year, in lieu of the original defendant, Walker D. Hines, Director General;

Whether, under the undisputed evidence, the court should have held, as a matter of law, that the plaintiff was not engaged in interstate commerce;

Whether, under the undisputed evidence, the court should have held, as a matter of law, that the plaintiff assumed the risk of injury;

Whether the evidence proved any actionable negligence on the part of the defendant;

Whether the court erred in submitting to the jury allegations of negligence not supported by any evidence.

The District Court of Douglas County, Nebraska, was without jurisdiction.

Whether or not the District Court of Douglas County, Nebraska, had jurisdiction does not depend upon the question as to whether or not the special appearance and the motion to quash constituted a general appearance. It depends upon the validity of General Order No. 18-B. If the order is valid, the court was without jurisdiction even though the defendant did enter a general appearance, which we deny, by filing the motion to quash the summons.

The Director General was sued in Douglas County. He was duly served with summons. The plaintiff did not reside in that county and his pretended cause of action did not arise therein. Under the plain terms of the order the court was without jurisdiction. The defendant by his motion challenged the jurisdiction. The only question involved was the validity of the order. The question as to whether or not the cause of action was local or transitory was answered by the order itself in plain language. It was not transitory, except within the limits of the order. The very purpose of the order was to make what had theretofore been a transitory cause of action a local cause of action, statutes and decisions to the contrary notwithstanding.

It was not the Director General's purpose to permit some litigants to try cases in jurisdictions other than the

jurisdiction prescribed by General Order 18-B and to deny this privilege to other litigants. The order applied to all alike. It was a war measure. It could not be waived by counsel. The question of jurisdiction does not depend upon nice distinctions as to whether or not the cause of action is transitory, or as to whether or not a general appearance was made in the case. The order was a command of the President of the United States, made by him through the Director General of Railroads during the war, and it had to be obeyed and could not be waived by anybody. War orders were made to be respected and obeyed by everybody and not to be ignored and evaded on technical grounds. The power to waive is the power to disobey, and privates in the ranks, such as counsel, may not disobey the orders of the Commanding General.

It was competent for the Government to couple with its consent to be sued, on causes of action arising out of Federal control, the condition that the suit be brought in the jurisdiction prescribed by General Order No. 18-B. *Alabama, etc. Ry. Co. v. Journey,* 257 U. S. 111.

> "The Federal Government had power to deny the right of suing it for acts growing out of its management of railroads or to prescribe terms and conditions for such suits, and when so prescribed they must be complied with." *Bailey v. Hines,* 109 S. E. 470.

> "It is now also settled law that during Federal control the operation of railways by the Director General was in substance and effect operation by the United States; that an action against the Director General to recover for injuries due to negligent operation is an action against the United States, and that a liability arises and an action can be maintained only if created and consent by the United States to be sued is given by some specific provision of law. See Northern Pacific R. R. Co. v. North Dakota, 250 U. S. 135, 39 Sup. Ct. 502, 63 L. Ed. 897; Missouri Pacific R. R. Co. v. Ault, 256 U. S. 554, 41 Sup. Ct. 593; Alabama & V. Ry. Co. v. Journey, 257 U. S. 111, 42 Sup. Ct. 6; Erie R. R. Co. v.

Caldwell (6 C.C.A.), 264 Fed. 947; Haubert v. B. & O. Ry. Co. (D. C.), 259 Fed. 361; Hines v. Dahn (8 C.C.A.) 267 Fed. 105, where the cases are collected; also Moon v. Hines, 205 Ala. 355, 87 So. 603, 13 A.L.R. 1020, where also the cases are collected and also commented upon.

"The validity of orders of the Director General modifying statutory and common law rules was sustained by the United States Supreme Court in Missouri Pacific R. R. Co. v. Ault, and Alabama & V. Ry. Co. v. Journey, above cited." *Sandoval v. Davis*, 278 Fed. Rep. 968, 971.

See also:

Smith v. Reeves, 178 U. S. 436.
Southern Bridge Co. v. U. S. Shipping Board, 266 Fed. 747, 751.

The defendant challenged the jurisdiction of the court at the first opportunity, on the ground that the suit was not brought in the jurisdiction prescribed by General Order 18-B, and continued to do so at every stage of the proceedings, in accordance with the well settled practice of Nebraska, as appears from the following quotation from *Baker v. Union Stock Yards National Bank*, 63 Neb. 801:

"A succession of well-considered cases has settled the law of this state as to the proper practice where want of jurisdiction over the person of a defendant is asserted. If a defendant claims that the court has acquired no jurisdiction over his person, *by reason of defects or irregularities in the process, or service thereof*, his course is by special appearance and objections to the jurisdiction; and if he goes further, and enters a general appearance, or invokes the powers of the court for any other purpose than quashing the pretended process, or service thereof, the defects are waived. Omaha Loan & Trust Co. Savings Bank v. Knight, 50 Neb. 342; Ley v. Pilger, 59 Neb. 561. *But where, for some reason, the defendant is privileged from suit in the county where or at the time when he is sued, he may set up want of jurisdiction by answer, along with any other defenses he may have.* Hurlburt v. Palmer, 39 Neb. 158; Anheuser-Busch Brewing Ass'n v. Peterson,

41 Neb. 897; Herbert v. Wortendyke, 49 Neb. 182; Barry v. Wachosky, 57 Neb. 534, 535; Goldstein v. Fred Krug Brewing Co., 62 Neb. 728. *While in several of these cases the defendant first made a special appearance and objections to the court's jurisdiction over him, and, after these were overruled, set up the defense in his answer, we do not think such course is required in cases of this character.* No special appearance or preliminary objections were made in Hurlburt v. Palmer, supra, or Herbert v. Wortendyke, supra, and the provisions of sections 94 and 96 of the Code of Civil Procedure (Secs. 8610 and 8612, Comp. Stat. 1922) taken together, would seem to make it clear that they were not required. See also Kyd v. Exchange Bank of Cortland, 56 Neb. 557. If such a defense is waived if not set up in the answer, it follows that the defense is not waived when set up by answer, and therefore that it is not waived by any preliminary steps required before raising it in the prescribed way. That such is the proper construction of the Code, is apparent upon consideration of the practice prior to the Code, and a comparison with the holdings of other courts."

The above rule of practice is also held to be correct in the following cases:

Stelling v. Peddicord, 78 Neb. 779.
Hurlburt v. Palmer, 39 Neb. 158.
Kyd v. Exchange Bank, 56 Neb. 557.
Templin v. Kimsey, 74 Neb. 614.

Want of jurisdiction is set up by the answer in the present case, along with other defenses (Rec., p. 28).

As stated by Judge Letton in his dissenting opinion in the present case (Rec., p. 311), "cases cited in the opinion as to a general appearance being made, when jurisdiction over the subject-matter of the suit is challenged, are not applicable." For the convenience of the court, we will briefly review the cases cited by the Supreme Court of Nebraska in support of its conclusion:

In *Handy v. Insurance Co.*, 37 Ohio St. 366, and in *Elliott v. Lawhead*, 43 Ohio St. 171, the defendant did not ask to have the summons quashed, but asked to have the case dismissed.

In re Moore, 209 U. S. 490, has no application.

In *Midland Contracting Co. v. Toledo Foundry & Machine Co.*, 154 Fed. 797, the court decided that objection to jurisdiction is waived by the defendant "entering a general appearance and asking for an extension of time in which to plead and for a continuance prior to the making of such objection."

In *Arizona & N. M. R. Co. v. Clark*, 235 U. S. 669, the court held that "the voluntary appearance of the defendant in the federal court after statehood without interposing any objection to the jurisdiction of that court" amounted "to a waiver of the objection * * * that upon the commencement of statehood the action should have been transferred to the proper state court * * *."

Champion Spark Plug Co. v. Champion Ignition Co., 247 Fed. 200, has no application whatever.

In *Western Loan & Savings Co. v. Butte & Boston Consolidated Mining Co.*, 210 U. S. 398, the court holds that "where diversity of citizenship exists so that the suit is commenceable in some circuit court, the objection to the jurisdiction of the particular court in which the suit is brought may be waived by appearing and pleading to the merits."

In *Thames & Mersey Ins. Co. v. United States*, 237 U. S. 19, the Government filed a demurrer which raised not only the question of jurisdiction of the subject-matter of the action, but also that of the merits. The court held this amounted to a general appearance.

It *St. Louis & S. F. R. Co. v. McBride,* 141 U. S. 127, the court held, "When a defendant is sued in a circuit court of the United States and pleads to the merits, he waives any right to challenge thereafter the jurisdiction of the court on the ground that the suit has been brought in the wrong district."

In *U. S. v. Hvoslef,* 237 U. S. 1, it appears that there was no specific objection made to the jurisdiction before pleading to the merits. The court held that the objection to jurisdiction was waived.

Perrine v. Knights Templar's & Masons' Life Indemnity Co., 71 Neb. 267, on rehearing 71 Neb. 273, was a suit brought in Jefferson County, Nebraska, on a benefit certificate issued by a mutual benefit association that had appointed the Auditor of State its Attorney-in-fact upon whom process might be served. An alias summons was served by the sheriff of Jefferson County on the Attorney-in-fact. The defendant moved to quash this service, alleging in his motion "that the court was without jurisdiction of the subject-matter or of the person of the defendant for the following reasons," whereupon the reasons are set forth, ten in number. The court says (p. 273):

> "We are now urged to disregard the challenge therein made to the jurisdiction of the subject-matter and treat it as surplusage. Our duty in this matter depends upon whether or not, under the 'reasons assigned,' there could have been anything considered by the court except the sole question of jurisdiction over the person of the defendant; not upon what was considered, but what might have been properly considered and determined by the court. * * *
>
> "With these considerations in view we turn to the 'reasons assigned.'"

The court then quotes the fifth and seventh reasons assigned in the motion and says (p. 275):

"The fifth objection challenges the right of the plaintiff to bring and maintain the action in Jefferson county. This raises the legal question whether or not the alleged cause of action set forth in the petition was local or transitory. The challenge was made to the court by apt language in the formal part of the instrument and in the reasons assigned, and is a jurisdictional question, not of the person, but of the subject matter of the action. And when followed by an exhaustive showing on this point, as was done, of the truth of these allegations, we can come to but one conclusion, and that is, it was the intention of the pleader to challenge the jurisdiction of the court over the subject matter, and that he has done so both by his averments and by the evidence. And again, the seventh assignment, if it means anything, is a plea of res judicata of the matters then pending before the court. It would be difficult to understand how the language of this assignment could be used for the sole purpose of challenging the jurisdiction of the court over the person of the defendant. That, to avoid an appearance, the objections must be confined to this purpose has been the holding of this court from its organization."

In *Summit Lumber Co. v. Cornell-Yale Co.*, 85 Neb. 468, the court followed the Perrine case, holding that the motion filed by the defendant amounted to a general appearance and waived irregularities in the issuance of the summons.

In *Clark v. Bankers Accident Ins. Co.*, 96 Neb. 381, the court followed the Perrine case, but the motion is in no particular similar to the motion in the present case.

In *Lillie v. Modern Woodmen of America*, 89 Neb. 1, the defendant's motion amounted to a demurrer to the petition.

In *Rakow v. Tate*, 93 Neb. 198, the defendant appeared and filed a cross-appeal, demanding affirmative relief.

In *Legan v. Smith*, 98 Neb. 7, the court held that the attempted special appearance was a general appearance and gave the court full jurisdiction over the person of the de-

fendant. The special appearance is too lengthy to set out herein, but is in no respects similar to the one filed by the defendant in the present case.

In *Maxwell v. Maxwell,* 106 Neb. 689, the court held that in his motion to quash the defendant plead matter "amounting to a demurrer to the petition."

In *State v. Westover,* 107 Neb. 593, 186 N. W. 998, the court followed the Perrine case, but the facts and circumstances involved are materially different from the present case.

We direct the court's attention to the following Nebraska decisions with respect to what constitutes a general or special appearance:

In *South Omaha National Bank v. Farmers & Merchants National Bank,* 45 Neb. 29, paragraph 1 of the syllabus reads as follows:

> "An appearance is special when its sole purpose is to question the jurisdiction of the court. It is general if the party appearing invokes the power of the court on any question other than that of jurisdiction. Whether it is general or special is to be determined by an examination of the substance of the pleading, and not by its form."

In *Bankers Life Insurance Co. v. Robbins,* 59 Neb. 170, paragraph 2 of the syllabus reads:

> "Whether an appearance is general or special does not depend upon the form of the pleading but upon its substance."

In 4 C. J. 1317, it is said:

> "Whether an appearance is general or special is to be determined from the relief asked, and in reaching its conclusion the court will always look to matter of substance rather than form. If the appearance is in effect general, the fact that the party styles it a special ap-

> pearance will not change its real character, although it may forestall the ordinary presumption that an appearance is general. Where a special appearance is evidently intended, the court cannot enlarge it and make it general, for the extent to which the defendant submits himself to the jurisdiction when he thus voluntarily comes in is determined by his own consent."

An examination of the defendant's motion (Rec., p. 9), in the light of the foregoing decisions, shows that he did not vest the court with jurisdiction by filing it.

In its opinion the Supreme Court of Nebraska says (Rec., p. 309):

> "But, aside from these considerations, these facts are relevant. At the first trial motions were made to dismiss the case for the reason that the plaintiff had not proved facts sufficient to constitute a cause of action, but no objection was made during the trial to the jurisdiction of the court, and the original special appearance and motion to quash the summons had been properly overruled, since there was no evidence to support it. No motion for a rehearing was made in this court after the filing of the former opinion in the case, and the former decision of the court has become the law of the case."

We fail to see how this tends to show that the District Court of Douglas County, Nebraska, had jurisdiction of this case. With respect to the motion referred to by the court, it should be remembered that the District Court sustained it and there was no reason for the defendant to complain further that the court had no jurisdiction. The statement that no objection was made during the trial to the jurisdiction of the court is misleading and overlooks the fact that want of jurisdiction was alleged in the answer and proved by undisputed evidence. We do not understand what bearing the fact that no motion for rehearing was filed has, unless the court wishes to give the inference that the jurisdictional question was not directed to its attention on the first appeal. In order that there may be no mistake concerning this,

we direct attention to the following from the opinion of the court on the first appeal (Rec., p. 329):

> "Defendant filed a special appearance objecting to the jurisdiction of the court over the person of defendant and over the subject-matter of the action, and moved the court to quash the summons theretofore issued, on the ground that certain general orders of the Director General of Railroads set out as a part of the motion provided that suits against the Director General of Railroads, as authorized by General Order No. 50-A, should be brought in the county or district where the plaintiff resided at the time the cause of action arose. This objection was overruled. It was again urged in the answer, and, by brief filed out of time by leave of court, it is sought to be urged now. But no cross-appeal from the ruling of the trial court was prosecuted by defendant, as required by the rules of this court, and appellee cannot be heard to urge this point now."

The rule of the court has no application whatever to a case of this nature, but only applies to cases where a final order had been entered against the appellee and he desired to have that ruling reviewed. In the present case there was no final order entered against the appellee and the judgment was in his favor and he had nothing to appeal from either directly or by cross-appeal.

The inference made by the above quotation from the opinion on the second appeal that the jurisdictional question was settled by the first appeal is not substantiated by the record.

It is settled law that the case could not be brought to this court from the decision in the first appeal, reversing the case and remanding it for a new trial.

> "This court cannot be called upon to review the action of the State court by piecemeal, and even if the judgment does finally dispose of some elements of the

controversy, unless it is final on its face as to the entire controversy this court will not review it."

Louisiana Navigation Co. v. Oyster Commission, 226 U. S. 99;
Chesapeake & O. Ry. Co. v. McCabe, 213 U. S. 207;
Bruce v. Tobin, 245 U. S. 18.

Apparently the Supreme Court of Nebraska merely *suspended* the rules of practice, settled by its former decisions, and did not overrule them. Whatever may be said as to the character of the defendant's motion, the opinion seems to be "special" and for the purpose of this case only, and not "general." Neither *Baker v. Union Stock Yards National Bank,* 63 Neb. 801, nor any of the many kindred cases, are even mentioned.

The fact is the court arbitrarily refused to give effect to the war order in question and its decision amounts to holding the order void.

This action abated for failure to substitute the successor of Walker D. Hines, Director General of Railroads, the original defendant, within one year after he vacated office.

The facts relevant to the substitution are stated in the petition filed herein.

It is our contention that Section 1594, Vol. 3, U. S. Comp. Stat. 1916, 30 Stat. L. 822, limits the time within which such substitution can be made to twelve months. This contention is supported by the following authorities:

Payne v. Industrial Board of Illinois, 42 Sup. Ct. 462;
LeCrone v. McAdoo, 253 U. S. 217;
Payne v. Slatinka, decided by this court January 8, 1923, but not yet reported.

The Winslow Act applies only to actions *properly* brought and, since this action was not properly brought, it does not apply here.

The verdict is not supported by the evidence.

(a) Because it does not show that the plaintiff when injured was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act.

The undisputed evidence showed that the gantry was supplied with the usual number of ropes and chains on the day of the accident (Rec., p. 156, Qs. 704 to 740).

The men were making the cable for handling lumber, poles, or any other wood. They had no cable prior to the accident (Rec., p. 160, Qs. 753 and 754). They were making the sling out of a piece of cable they had in the tool house (Rec., p. 160, Q. 759). The sling was not to be permanently attached to the gantry, but was to be used the same as the chains and ropes with which the gantry was supplied were used (Rec., p. 162, Qs. 771 to 775). The sling was not completed before the accident, and they did not transfer any more cars until two days after the accident, or until September 15th. They did not use the cable in transferring them. They started transferring a car of poles on September 15th and finished it on the 16th and did not use the cable for that purpose (Rec., p. 163, Qs. 775 to 793).

The plaintiff was not engaged in interstate commerce, even if he were assisting the men in making this cable when he was injured, which we deny. The cable which the men were making was a new appliance and had not been devoted to commerce of any kind at the time of the accident. Under the circumstances, the men engaged in making the cable were not engaged in interstate commerce any more than a blacksmith would have been had he been making the cable in question in his own shop.

Industrial Accident Commission of State of California, et al., v. Payne, Agent, 42 Sup. Ct. 489, and cases cited therein.

In *New York Central R. Co. v. White,* 243 U. S. 188, the court holds that a night watchman, while guarding materials intended to be used in the construction of a railway station and new tracks, was not engaged in interstate commerce, although the station and tracks were designed for use, when finished, in such commerce.

In *Illinois Central R. R. v. Behrens,* 233 U. S. 473, the court holds that a switchman who handled interstate and intrastate cars indiscriminately, "frequently moving both at once and at times turning directly from one to the other," was not engaged in interstate commerce when engaged in handling intrastate traffic.

In *Minneapolis & St. Louis R. Co. v. Winters,* 242 U. S. 353, the court held a machinist's helper, while making repairs upon an engine used in hauling both intrastate and interstate freight, was not employed in interstate commerce.

(b) There was no proof of negligence.

Before discussing the evidence bearing on this subject, we will briefly review the decisions of the Supreme Court of Nebraska rendered on the first and second appeals.

The first trial resulted in an instructed verdict for the defendant, and the first appeal was an appeal by plaintiff from this judgment. The court decided: "The provisions of the Federal Employers' Liability Act create a liability against the employer for the negligence of a fellow employee of an injured workman," and that it was "error for the trial court to instruct the jury to return a verdict in favor of defendant."

There was no controversy with respect to the defendant's liability for the negligence of a fellow servant. That he is liable for such negligence, if any, is settled by the terms of the Federal Act. The question was whether the evidence

proved facts sufficient to constitute a cause of action under this act.

The court says in its opinion (Rec., p. 326): "In the present state of the record it does not appear necessary to determine whether defendant was guilty of actionable negligence in failing to provide suitable wires, repairs, tools and machinery for the proper operation of the gantry * * *" and the court holds that the question as to whether or not E. W. O'Hara was guilty of actionable negligence, when he let the plaintiff have the cap, was for the jury and reversed the case for this reason.

At the second trial the court by its instructions (See Instructions 1, 2, 3 and 4, Rec., p. 44) submitted all of the alleged acts of negligence set forth in the plaintiff's petition to the jury.

The second trial resulted in a verdict and judgment in favor of the plaintiff for $46,840.11, and the defendant appealed from this judgment. The record presented the questions hereinbefore referred to.

On the second appeal the court decided among other things:

> "There being no substantial difference in the evidence upon the second trial of this case from that set forth in the opinion at the former hearing, 108 Neb. 74, 187 N. W. 643, the conclusion of the court that the evidence was sufficient to sustain a judgment has become the law of the case, and is adhered to.
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> * * * * *
>
> "A verdict for $46,840.11 for an injury resulting in the loss of the sight of both eyes *held*, under the facts in this case, to be excessive, and a recovery of $37,500 is allowed."

In accordance with the practice, the plaintiff on Febru-

ary 21, 1923, filed a remittitur, remitting all of the judgment in excess of $37,500, and on that day the court ordered that the judgment of the District Court in the sum of $37,500 be affirmed (Rec., p. 313).

In due time, and on March 6, 1923, the defendant filed a motion for a rehearing, which was overruled March 30, 1923 (Rec., p. 315).

In its opinion on the second appeal, the court says (Rec., p. 300):

> "The principal grounds relied upon for reversal are: that the court had no jurisdiction over the person of the defendant, and over the subject-matter of the suit; and that the evidence is not sufficient to support the verdict.
>
> "Error is also assigned as to the giving of instructions by the court, and the refusal to instruct the jury to return a verdict for the defendant. It is also said that it was prejudicial error for the court to embody in its instructions allegations of negligence unsupported by any competent testimony. In this connection it is said that it was not negligence for the defendant to fail to provide wire with which to tie the cloth to the cable, nor for the foreman to direct the use of the wire without examining the same, nor negligence for him to fail to see and note the dangerous condition of the wire. It is pointed out in the former opinion that, under the Federal Employers' Liability Act, a fellow workman stands in the shoes of the master, and when he acts for the master in a negligent manner, within the scope of his employment, his negligence is the negligence of the master. The argument in this connection that O'Hara did not give the wire to the plaintiff to promote the defendant's business, or in the course of it, but simply to comply with John O'Hara's request, was submitted to the jury, and their verdict settled the question as to whether such conduct of O'Hara was negligent. * * *"

The court makes no further mention or comment in its opinion with respect to the defendant's contentions.

The allegations of negligence set forth in the petition are:

(a) That the defendant neglected to provide wire, repairs, tools and machinery for the proper operation of the gantry.

(b) That the defendant failed to furnish wire upon said machinery or its appurtenances.

(c) "That the foreman directed his subordinates to procure wire to complete said work."

(d) That the foreman accepted the wire and "directed its use by his subordinates without carefully examining the same and neglecting to see and note its dangerous condition."

(e) That wire with the explosive cap attached thereto "was negligently given to him (plaintiff) as a part of the tools and materials with which he was supplied for his said work" (R., p. 28).

"A person is not liable for a mere error in judgment." *O'Neill v. C., R. I. & P. Ry. Co.*, 66 Neb. 638; *Maue v. Erie R. Co.*, 91 N. E. 628.

"There is a plain distinction between the suggestion of a possible precaution by which an injury might probably have been avoided, and the adducing of evidence which shows that the injury was caused by negligence of the defendants. Probably scarcely a mishap occurs where the wisdom which comes after the event cannot suggest some expedient by which, through the exercise of a more abundant caution, the accident might not have been prevented." *Nolan v. Shickle*, 3 Mo. App. 300, 305.

"Negligence consists in a failure to provide against the ordinary occurrences of life, and the fact that the provision made is insufficient as against an event such as may happen once in a lifetime, or perhaps twice in a century, does not * * * make out a case of negligence upon which an action in damages will lie." *Ford v. Tremont Lbr. Co.* (La.) 22 L. R. A., (N. S.) 917, 920.

In *Ryan v. Cortland Carriage Co.*, 118 N. Y. S. 56, it is said:

"Failure to guard against that which has never occurred and which is very unlikely to occur, and which does not naturally suggest itself to prudent men as something which should be guarded against, is not negligence.

"After an accident has occurred it may be easy to say what would have prevented it; but that of itself does not prove nor tend to prove that reasonable or ordinary care would have anticipated and provided against it. The master's liability depends, not upon what can be seen by everybody after the happening of an accident, but upon what he should have known or anticipated before the occurrence." *Atoka Coal & Mining Co. v. Miller,* 170 Fed. 584, 586; *Maue v. Erie Co.,* 198 N. Y. 221, 91 N. E. 629.

In *Bryant v. Beebe & Runyan,* 78 Neb. 155, it is said:

"To warrant a finding that a negligent act or omission, not amounting to a wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural or probable consequence thereof, and that it ought to have been foreseen in the light of attending circumstances." *McGill v. Michigan S. S. Co.,* 144 Fed. 788 (C.C.A., 9th Circuit, writ of certiorari denied, 203 U. S. 593).

The evidence bearing upon the allegations of negligence is in substance as follows:

On the day of the accident the plaintiff and the men with whom he was working were employed at the gantry, which is a large crane used to transfer heavy shipments from one car to another. The record shows that some of the shipments transferred were moving in interstate commerce, but does not show that the gantry was used exclusively to transfer shipments moving in such commerce.

They finished transferring a carload of steel during the forenoon and had nothing to do until another car was set at the gantry by the switch crew. While they were wait-

ing for this, the foreman decided to make a sling out of a discarded wire cable.

The plaintiff testified (R., p. 76, Q. 33): "The foreman said to get the cable out of the shanty that we had put in there, and to cut off a piece that would be large enough to make a cable sling." This was a general order to the gang. After the cable was cut off, the ends were clamped together with U-bolts (R., p. 78, Q. 50). After this was done "Mr. Turner said that where the coupling (cable) was cut off, the strands of the wire were all loose, and he said it would be better to put a cloth or something around the ends, so that nobody would get their hands hurt when they were handling the sling, and he said to get cloth to wrap around this, and we would have to have some wire to fasten it down with" (R., p. 79, Q. 59). There was no suitable wire in the tool house and this fact was reported to Foreman Turner and "He said to see if we could find some." This order was given "to the gang" (R., p. 79, Qs. 60 to 65). "My uncle (E. W. O'Hara) found some wire in the empty coal car. I did not know where he got it from at the time." He brought the wire up to "where they were working and showed it to the foreman, and held it up in his hand and asked him if that would do, and he said yes, that probably they would have to be careful of it or there would not be enough of it to do the work with" (R., p. 80, Q. 68). (Exhibit 3, Rec., p. 121, is the same kind of cap and wire). "My uncle cut off a piece to wrap around the cloth, and the other was handed to me. The piece that had the cylinder on it, and the wire that had been crumpled up when he tried to take it off, four or five inches of wire, besides what was crumpled up around in the end of the cylinder. I though that if they would not have enough of the wire that what was left there could be used, and I took the piece that my uncle gave me and tried to straighten it out, the part that he crumpled up, and when I did that I sat down on the rail which the gantry runs on, and I had the cylinder part in my left hand

and the end of the wire in my right hand, and as I went to pull this out and straighten it the cylinder slipped out of my left hand and struck on the rail. My hands were close to the rail when I was pulling." It exploded and blew my eyes out (R., pp. 80 and 81, Qs. 71 to 76). I did not know what the cap on the end of the wire was. I was going with the wire to help fasten the cloth on so it would stay on better (R., p. 81, Qs. 82 to 85). The first time I saw the cylinder or cap was when my uncle gave me the wire and I started to straighten it. My uncle did not say anything to me and I did not say anything to him when I took the cap. No one said anything to me at that time. Mr. Turner was a few feet away working on the clamps. I did not call his attention to the cap and "I do not suppose he knew I had it" (R., p. 87, Q. 145). No explosives or caps were used in the work and none were kept on the premises.

Francis W. O'Hara, plaintiff's witness, testified that the foreman "told some one to get some cloth" and they got it, but there was no wire (R., p. 104, Q. 281). When Foreman Turner asked some one to get the wire "my father (E. W. O'Hara) told us that he had found some if there wasn't any there. My father said he had seen some that morning in that car with the sheet iron that they unloaded, and he went up and got that" (R., p. 105, Q. 287). "He held it up to the foreman and asked him if it was all right" and the foreman "said it was all right, but there would not be enough of it. My daddy said it will have to be because that is all there is" (R., p. 105, Qs. 297 to 299).

Edward W. O'Hara, plaintiff's witness, testified that during the forenoon he noticed "a piece of wire in the coal car from which he transferred the sheet iron. I did not pay any attention to it" (R., p. 115, Q. 393). There was a car of telegraph poles that we expected to transfer and "the foreman said that they were to fix it right after dinner * * * He said that we would have to make a sling out

of a piece of cable, as the rope was not heavy enough to handle them" (R., p. 116, Q. 403). There was a piece of cable in the shanty. "Some of them got this cable out and cut off about what they wanted of it * * *. I was at something else. I did not help take it out or cut it off * * *. It was clamped together with U-bolts. I suggested that we get a cloth and tie it around the end of the cables on account of where they were cut they were so rough that they would tear our hands" (R., pp. 116 and 117, Qs. 406 to 412). The foreman said "we would have to cover it up or we would cut our hands on it and we should tie a cloth on it." This direction was not given to any one in particular. "Well, they got the cloth and had to have something to tie it on with. I said we would have to tie it on with some wire; string would not be heavy enough. We did not have any. So I happened to think of the piece I had seen in this car that I had transferred the sheet iron from. I went in there and got it, and when I got it it had this cylinder on it. I did not know there was a cylinder on it until after I took it up. There was two strands of wire, separate strands of wire coming out of the ends of the cylinder. I tried to twist it off. It did not go and I picked up a hammer that was laying there, and I laid it across the rail and I cut it off. I took one piece with the cylinder and hung it up in the shanty, in the tool house, and the other piece I took down and I and Mr. Berg wrapped it around the cable * * *" (R., p. 117, Q. 418). When I got the wire, "I crawled out of the car with it and Turner was just coming down out of the crane * * * and I was just a little ahead of him, and I held it up, I says, I guess this will be all right; he said, yes, if you have enough of it. I did not have very much of it. I says, it will have to be enough, that is all there is" (R., p. 118, Q. 420) * * * I would not say that Mr. Turner saw the cap. "It would have been very easy to overlook. It was not very large" (R., p. 137, Q. 595). Exhibit 3 is similar to the cap and wire that I had. After Mr. Berg and I had tied one cloth on, I

went and got the other piece and cut it off the cap, leaving about four or five inches attached to the cap. "I started down where Turner was working, where the cable was, and I had the wire in one hand and the cap by the end * * * John was there and I gave it to him. He reached over and took it (R., p. 153, Qs. 455 to 459). I did not know what the cap was and did not make any effort to find out. I said it looked like a fire cracker, but I do not know whether John heard that or not (R., p. 125, Q. 455). After John took the cap, I went right on down to the end of the crane where Turner was working. I worked there a minute or a minute and a half and heard the explosion and heard John scream. I was not over five feet away (R., p. 126, Q. 478).

On cross examination E. W. O'Hara testified: Immediately before the explosion "I was standing down there waiting for them to get the U-bolts tight and had the wire in my hand. John had the cap at that time" (R., p. 133, Q. 547). After I got the wire out of the coal car "I had the cap in the left hand and I tried to pull the wire out. I jerked on it two or three times and it did not come, and I tried to twist it off. It was not heavy. I thought it would twist, but it did not twist. It was too tough. I laid it across he rail like that and hit it with the hammer and cut it off, and I took one part of it, the part that had the cylinder on and I hung it up in our shanty because I was going to use it later, and took the piece that was in my hand and wrapped it around the cable." That tied on one cloth (R., p. 132, Qs. 539 and 540). I later got this strand and cut the cap off to tie the other cloth on (R., p. 133, Q. 551). He testified:

557 Q. What were you going to do with the cap when you cut it off, did you have any use for that?
A. No. I hadn't any use for it (R., p. 134).

564 Q. What were you in the act of doing with the cap after you cut it off and before John took it?
A. I had it in my hand.

565 Q. For what purpose did you have it in your hand?

A. Why, I just had that cut off, of course, is the reason I had it in my hand.

567 Q. What did you do with it?

A. I gave it to John.

568 Q. How did you happen to take it back to John?

A. I don't know. He reached over and took it, I guess. At least I gave it to him.

569 Q. Did you give it to him or did he reach over and take it?

A. Well, kind of both, I guess. When he reached I handed it to him.

570 Q. Did he say anything to you?

A. He wanted to know what it was. He said, what is that? I says, I don't know, it looks like a fire cracker.

571 Q. Is that all that was said?

A. That is all.

At that time John walked over and sat down on the rail and I went on with my work (R., p. 136, Q. 576). It was possibly two minutes after that that I heard the explosion. I did not know what the cap was at the time I gave it to him. I had never seen one before (R. p. 136, Qs. 577 to 581).

581 Q. You had all of the wire that you needed to tie that other cloth on at that time, did you not?

A. I do not know whether I had all I needed. I had about all there was (p. 136).

584 Q. You had cut off all there was. That is all you had, was it not?

A. I cut off the most of it anyhow.

604 Q. What was your purpose in letting John take the cap from you?

A. I had no purpose. I would give it to anybody that would ask for it (p. 137½).

The plaintiff, John O'Hara and his uncle, E. W. O'Hara, both testified that the plaintiff resided in Council Bluffs,

Iowa, at the time of the accident and that the accident occurred in that place (Qs. 121 to 130, p. 85).

John Turner, a witness for the defendant, testified that they used chains at the gantry to transfer sheet iron or steel. That they had chains on the day of the accident; that they had two ropes, an inch and a half rope and a two-inch rope. That this was the ordinary equipment of the gantry (R., p. 158, Qs. 729 to 740). After we finished unloading the steel we did not have any particular duties to perform, except to wait until another car was set. On the day of the accident we made a cable sling after dinner; that is all we did after we finished unloading a car of steel. We made the sling "for handling lumber and poles and anything in that line of wood so in case we had a load of wood we would use the cable, and otherwise if it was steel or iron we used a chain." I had been working there since January, 1919, and there was no cable sling there during that time (R., p. 160, Qs. 751 to 757). "We had a piece of cable in the tool house and I told some of the boys to bring that cable out and cut about 30 or 35 feet off of it, and to make a cable we would have to have some cable clamps to make a sling, and it would be much easier to use than a chain in going around double loads of lumber and telephone poles and anything of that kind in that line, and so they brought the cable out * * * and cut it and put the clamps on and fastened the hoist on and put it around the end of the coal car. We had it fastened to the hook at the top of the crane so you could tighten the nuts on the clamps. Ed. O'Hara was standing by my left side, I believe it was. I had the monkey wrench and was tightening the clamps on the cable when I heard the explosion * * *" (R., p. 161, Q. 759). I did not know there were any explosives on the premises and had not seen this cap and did not know that any one had it. If E. W. O'Hara held the wire up for me to see, I did not see it (R., p. 164 Q. 749).

801 Q. Do you recall what directions, if any, you gave in regard to tying cloth on this cable?

A. Well, I asked some of the boys if there was any wire, to get some wire, that there was some of that little rope or twine in the car (shanty), that it was all right, and some said the wire was too big. I saw there was an old broom in there, and you can tear the old broom up and use the broom wire, either that or some of this binding twine. That is as far as I know. I do not know where they got the wire, in the shanty or where it came from.

The foregoing is the substance of all of the evidence bearing upon the accident and the way it happened.

O. B. Monahan, employed by the Dupont Powder Company, Wilmington, Delaware; A. E. Anderson, technical representative for the Dupont Powder Company; C. P. Beistle, chief chemist for the Bureau of Explosives, and who for six years was assistant chemist for the Bureau of Ordnance of the War Department, and H. A. Campbell, an inspector for the Bureau of Explosives, all qualified as experts and testified on behalf of the defendant. Each of these witnesses testified that he had had experience in handling explosives of various kinds and that he had handled and was familiar with the proper method of handling electric blasting caps such as the one the plaintiff exploded.

Mr. C. P. Beistle made tests of the blasting caps "to see how much they would stand in rough handling." He made a device, a picture of which is shown at page 244, Exhibit 14, and with this appliance allowed a weight to strike the cap so as to indent the same at the loaded end, as shown by Exhibits 15, 17 and 18, at pages 246 and 248 of the record. Mr. Beistle testified that he also "took some of these electric blasting caps that were packed ready for transportation, and we took a box up on top of a cliff and just threw the whole box over, and it fell down about forty feet and struck the rocks on the bottom and broke the wooden box all to pieces, and some of the paste-board cartons, or inside boxes were broken open, and many of the caps came out, but none were exploded" (R., p. 249, Q. 1419).

All of the expert witnesses testified that, in their opinion, an electric blasting cap could not be exploded in the manner in which the plaintiff testified he exploded the one in question. The experts also testified that the electric blasting caps such as the plaintiff was injured with are used commercially; that when the caps are furnished to the employee who is to use them the wires attached thereto are folded; that the men unfold the wires by "whipping" them out, and that in doing so they frequently strike hard substances and are subjected to blows similar to the blow which the plaintiff testified he accidentally gave the cap with which he was injured. That in all of their experience, ranging over many years, they never heard of a cap exploding from such a blow. They further testified that the electric blasting cap could not be exploded in ordinary handling or in the manner plaintiff claimed; that while they would explode from concussion, it required a blow sufficient to indent the shell to explode the cap.

No foresight short of prophetic vision could even have suggested the finding of the cap, and consequently it is impossible to presume that a man of ordinary prudence would have taken thought to prevent it. The defendant was not called upon to apprehend the occurrence of an extraordinary mishap which he could not have reasonably contemplated as a probable consequence of the work which the men were doing. Therefore, the inquiry is not whether the accident might have been avoided if the defendant had anticipated its occurrence, but whether under the circumstances disclosed by the evidence he was guilty of negligence in failing to anticipate the accident and provide against its occurrence. It was not negligence to undertake to make the sling. There were no more dangers, so far as human foresight could foresee incident to wrapping the cable with cloth and tying it with wire than are incident to the ordinary walks of life or to the ordinary games of childhood. This work commonly and generally could have been done without the slightest

risk and would have been completed without mishap in this case but for the finding of the cap. E. W. O'Hara was innocently ignorant that there was any danger, either in getting the wire from the car or in using it after he got it. This is established, not only by his positive testimony to that effect, but by the manner in which he handled the cap and wire. He had not the slightest reason to believe or to suspect that the plaintiff would injure himself with the cap when he asked for and took it. There was, of course, no duty on the part of E. W. O'Hara or the other men to have knowledge of these caps and knowledge cannot be imputed to them. Their conduct must be judged in the light of their actual knowledge concerning it. However, if E. W. O'Hara had possessed the knowledge of an expert, he would not have hesitated to let the plaintiff have the cap under the circumstances disclosed by the evidence. The undisputed testimony of the experts referred to above so shows.

In proceedings brought under the Federal Employers' Liability Act, "rights and obligations depend upon it and applicable principles of common law as interpreted and applied by the federal courts; and negligence is essential to recovery." *New Orleans & N. E. R. R. Co. v. Harris,* 247 U. S. 367. At page 371 of the opinion in the Harris case the court says:

> "The federal courts have long held that where suit is brought against a railroad for injuries to an employee resulting from its negligence, such negligence is an affirmative fact which plaintiff must establish. The Nitro-Glycerine Case, 15 Wall. 524, 537; Patton v. Texas & Pac. Ry. Co., 179 U. S. 658, 663; Looney v. Metropolitan R. R. Co., 200 U. S. 480, 487; Southern Ry. Co. v. Bennett, 233 U. S. 80, 85. In proceedings brought under the Federal Employers' Liability Act rights and obligations depend upon it and applicable principls of common law as interpreted and applied in federal courts; and negligence is essential to recovery. Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 501, 502; Southern Ry. Co. v. Gray, 241 U. S. 333, 339; Erie R. R. Co. v. Winfield, 244 U. S. 170, 172; New York

Central R. R. Co. v. Winfield, 244 U. S. 147, 150. These established principles and our holding in Central Vermont Ry. Co. v. White, 238 U. S. 507, 511, 512, we think, make it clear that the question of burden of proof is a matter of substance and not subject to control by laws of the several states."

The Nitro-Glycerine Case 15 Wall. 524, cited approvingly by the court in the Harris case was an action for damages caused by the explosion of nitro-glycerine while employees of an express company were opening the case containing it, to repair a leak therein. They did not know what it was or that it was dangerous. The court held that there was no liability. At page 536 of the opinion the court says:

"The defendants being innocently ignorant of the contents of the case, received in the regular course of their business, were not guilty of negligence in introducing it into their place of business and handling it in the same manner as other packages of similar outward appearance were usually handled. 'Negligence' has been defined to be 'the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.' It must be determined in all cases by reference to the situation and knowledge of the parties and all the attendant circumstances. What would be extreme care under one condition of knowledge, and one state of circumstances, would be gross negligence with different knowledge and in changed circumstances. The law is reasonable in its judgments in this respect. It does not charge culpable negligence upon any one who takes the usual precautions against accident, which careful and prudent men are accustomed to take under similar circumstances.

* * * * * * * *

"Here no such proof was made, and the case stands as one of unavoidable accident, for the consequences of which the defendants are not responsible. The consequences of all such accidents must be borne by the sufferer of his misfortune."

In *Cleghorn v. Thompson*, 62 Kans. 727, 64 Pac. 605, the court quotes approvingly from *Pollock on Torts* as follows:

> "'Where a man, proceeding in a lawful business, exercises reasonable care, the law does not make him an insurer of others against those consequences of his actions which reasonable care and foresight could not have prevented. The law justly ascribes such consequences to inevitable misfortune or to the act of God, and leaves the harm resulting from them to be borne by him upon whom it falls. The contrary rule would obviously be against public policy, because it would impose so great a restrain upon freedom of action as materially to check human enterprise'."

In the same opinion the court quotes approvingly as follows from *Thompson on Negligence:*

> "'It is conceded by all the authorities that the standard by which to determine whether the person has been guilty of negligence is the conduct of the prudent, careful, diligent, or skillful man in the partitcular situation'."

In *Southern Pacific Co. v. Berkshire*, 254 U. S. 415, the court says:

> "In this case the question is not whether a reasonable insurance against such misfortunes should not be thrown upon the traveling public through the railroads, or whether it always is possible for a railroad employee to exercise what would be called due care for his own safety and to do what he is hired to do. The question is whether the railroad is liable under the statute according to the principles of the common law regarding tort. * * * When a railroad is built, it is practically certain that some deaths will ensue, but the builders are not murderers on that account when the forseen comes to pass. On the common-law principles of tort the adoption of an improvement in the public interest does not throw the risk of all incidental damage upon those who adopted it, however fair it may be to put the exjenses of insurance upon those who use it * * *"

The plaintiff knew that he had two fragments of wire, too short to use, with something attached to the ends thereof. He had not been directed to use any such appliance, either by the foreman or by E. W. O'Hara, and there is no testimony in the record showing "that it was negligently given to him as a part of the tools and materials with which he was supplied for his said work," as alleged in the petition. If he was, in fact, trying to straighten the wire when he was injured it is plain that the wire had not been furnished him for the purpose alleged in his petition. E. W. O'Hara did not give him the wire either to use or straighten, and he was in no different position than if he had found it himself and undertaken to straighten it.. There is nothing in the record to show that E. W. O'Hara knew, or should have known that the plaintiff intended to straighten the wire attached to the cap, or to make any use of it in connection with the work. The record positively shows to the contrary, for E. W. O'Hara testified that he was about to throw the cap away after he severad it from the wires and had no further use for it. Under the circumstances disclosed by the evidence, E. W. O'Hara could not have supposed that the plaintiff intended to make any use out of the cap, or the small fragment of wire attached thereto. He did not "furnish" him the wire to tie the cloth with and the plaintiff's own testimony so shows, as well as the testimony of E. W. O'Hara.

When the plaintiff undertook to handle a foreign article, he assumed the risks incident thtreto. He was a mere volunteer when he asked for and received the cap and exploded it. It was the cap and not the wire that the plaintiff desired. If E. W. O'Hara had been in the act of throwing aside such a fragment of wire without a cap attached thereto, it is plain that the plaintiff would not have gone to the trouble to pick it up or straighten it, but would have understood from the fact that his uncle was discarding it that it was not fit for use. According to the plaintiff's own testimony, he stood idly by watching the

other men until he saw the cap. Until that time, he had not made any effort to search for wire or to help tie the cloths to the cable. The record discloses that the plaintiff was not acting within the course or scope of his employment when he was injured. The record fails to show any actionable negligence on the part of the defendant or his agents. The record does show that the plaintiff knew as much about the dangers incident to the work as any of the other men, and he, therefore, assumed the risk.

Assumption of risk is a complete defense to actions brought under the Federal Employers' Liability Act, except where the negligence of the carrier is in violation of some statute enacted for the safety of employees. *Jacobs v. Southern Railroad,* 241 U. S. 229; *Boldt v. Pa. R. Co.,* 245 U. S. 441.

E. W. O'Hara cannot be imputed with knowledge of the fact that the cap was dangerous without also imputing such knowledge to the plaintiff. The plaintiff was not injured from any act on the part of E. W. O'Hara, but was injured, according to his testimony, by accidentally striking the cap against the rail. If the suit had been brought against E. W. O'Hara on the ground that he was negligent under the facts disclosed by the record, we submit that no recovery could be sustained.

If we are right in these conclusions, the defendant was entitled to an instructed verdict.

The court instructed the jury (Instruction 4, R., p. 46):

"The burden of proof is upon the plaintiff to establish by a preponderance of evidence the following material allegations:

"1. That the defendant was negligent in some particular, as alleged in the plaintiff's petition.

"2. That the said negligence, if any you find, was the direct, immediate and proximate cause of the injury to the plaintiff.

"3. The amount of damage which the plaintiff has sustained, if any."

We submit that under the facts disclosed by the record, the court erred in giving this instruction, because by so doing all of the allegations of negligence set forth in the plaintiff's petition were submitted to the jury, but there was no proof to support them.

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be granted.

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